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No. 85-5720 & 85-5907

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

October Term, 1985

GELTMAN INDUSTRIES, INC.,
Petitioner,

VS.

THE TRUSTEES OF THE AMALGAMATED
INSURANCE FUND,
Respondents.

PETITION OF GELTMAN INDUSTRIES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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QUESTION PRESENTED

1. Are the limitations on employer withdrawal liability set forth in 29 U.S.C. § 1405(a) [ERISA § 4225(a)] automatically inapplicable to an employer which has otherwise met the requirements simply because the employer has become insolvent? In a case of first impression, the Court of Appeals for the Ninth Circuit so held in affirming a judgment awarding withdrawal liability to Respondents that excluded application of 29 U.S.C. § 1405(a), despite the fact that there is no such restrictive statutory language or legislative history supporting such an interpretation and despite the fact that the Pension Benefit Guaranty Corporation, the government agency charged with the responsibility for enforcing the provision, interprets the section to permit application of the Section 1405(a) limitations in such a case. The Ninth Circuit thereby severely diminished the rights of liquidating employers withdrawing from pension plans to limit their withdrawal liability.

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GELTMAN INDUSTRIES, INC.,
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THE TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Respondents.

PETITION OF GELTMAN INDUSTRIES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner Geltman Industries, Inc.[1] respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

[1]The only parties hereto are Petitioner Geltman Industries, Inc., a dissolved corporation, and Respondents, the Trustees of the Amalgamated Insurance Fund, who are trustees of the Amalgamated Insurance Fund, a Multiemployer Taft-Hartley trust fund. The Pension Benefit Guaranty Corporation filed an *amicus curiae* brief in the Court of Appeals for the Ninth Circuit.

OPINION BELOW

Trustees of the Amalgamated Insurance Fund v. Geltman Industries, Inc., 784 F.2d 926 (9th Cir. 1986) is reproduced in Appendix A, page A-1.

JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was filed March 7, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4225 of the Employee Retirement Income Security Act of 1974, PL 93-406 ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980, PL 96-358 ("MPPAA"), 29 U.S.C. § 1405, is reproduced in Appendix B, page B-1.

STATEMENT OF THE CASE

Petitioner Geltman Industries, Inc., was a family owned company that was involved in the garment industry business. Geltman's business had been in decline for many years prior to its ultimate cessation. Geltman ceased its operations in late February, 1982 because continued losses had brought it precariously close to a negative net worth. The cessation became a *fait accompli* in late 1981, when the company failed in a last ditch attempt to win wage concessions from the Union which had long represented its employees. In December, 1981, Geltman announced to the employees the closure. Geltman negotiated a sale of operating assets and applied the proceeds in the payment of creditors and shareholders in the liquidation of the business. The only substantial assets left after most of Geltman's liabilities were paid were $98,000 in cash, and a note providing for payment to

Geltman of $2,000 per month for 120 months given in exchange for Geltman's lease rights. The Geltman shareholders received the $98,000 plus the right to receive $2,000 per month for 120 months.

Dissolution of the corporation was completed in March of 1982 and a Certificate of Winding Up and Dissolution was duly filed with the California Secretary of State on March 30, 1982. Thereafter, on April 6, 1982, Respondents, The Trustees of The Amalgamated Insurance Fund ("Fund"), issued to Geltman a Notice of Withdrawal Liability and on April 13, 1982 informed Geltman that the amount of the liability was $416,508.12. This was the first that anyone then affiliated in any way with Geltman had ever hear of "withdrawal liability" or MPPAA.

The parties arbitrated the issue of withdrawal liability pursuant to 29 U.S.C. § 1401 [ERISA § 4221]. Geltman raised defenses both to the calculation of the amount of liability by the Fund and with respect to certain statutory limitations of liability it contended were applicable, in particular, 29 U.S.C. § 1405(a) [ERISA § 4225(a)].

In a Supplemental Arbitration Decision the arbitrator awarded the entire liquidation value of Geltman (the $98,000 in cash plus the stream of $2,000 monthly payments) to the Fund pursuant to 29 U.S.C. § 1405(b), and reaffirmed his legal conclusion that the limitation of liability in Section 1405(a) was not applicable to the case.

The Fund applied to the district court to confirm the Arbitration Award and Geltman moved in its Response and in a separate motion to modify the Arbitration Award pursuant to 29 U.S.C. § 1401(b)(2), [ERISA § 4221(b)(2)], arguing for the application of Section 1405(a). On February 21, 1985, the district court granted the Fund's application and denied Geltman's motion stating: "regardless of the standard of judicial review

applied here, this court agrees with the arbitrator's application of 29 U.S.C. § 1405(b) herein."

Petitioner duly appealed to the Court of Appeals for the Ninth Circuit which on March 7, 1986, issued its opinion affirming the district court on this issue. In doing so, it held for the first time that employer insolvency requires exclusion of the limiting provisions of Section 1405(a) in determining employer withdrawal liability.

ARGUMENT

The Court of Appeals for the Ninth Circuit has erroneously decided an important federal law question of first impression which has not been, but should be, settled by this Court. The Ninth Circuit Opinion will have a far reaching and profound impact on withdrawing employers and the way in which pension funds nationwide determine employer withdrawal liability.

In construing Section 1405 according to its "plain language" the Ninth Circuit ignored crucial provisions included in Section 1405(a), misconstrued the scope of Section 1405(a), and ignored the general policy underlying Section 1405, which is to balance the burdens to be assumed by the pension plans and the withdrawing employers. The Ninth Circuit's construction of Sections 1405(a) and 1405(b) virtually emasculates the limiting provisons of Section 1405(a) intended by Congress to limit an employer's withdrawal liability. In doing so, the Ninth Circuit has greatly diminished the employer's right under ERISA and MPPAA to limit its withdrawal liability when it otherwise meets all of the requirements of Section 1405(a). The Ninth Circuit has effectively turned subsections (a) and (b) of Section 1405 on their heads.

Nothing in the Language of Section 1405 Mandates Application of Subsection (b) to the Exclusion of Subsection (a).

Section 1405(a), on its face, is available to *any* employer, "other than an employer undergoing reorganization under Title 11, or similar provisions of State law." Congress saw fit to place *but one restriction* on the availability of this relief provision — it is not available to an employer undergoing reorganization (*Chapter 11*) under Title 11 or a similar state law. There is no other restriction. Hence, the limitation of liability in Section 1405(a) *is* available, for instance, even to bankrupt and insolvent employers undergoing *liquidations* (Chapter 7) under Title 11.

Plainly, Congress sought to distinguish between the two sorts of Title 11 bankruptcies by precluding the limitations in Section 1405(a) from applying only where the employer's business was continuing. This express distinction is logical because in the bankruptcy reorganization situation, there is no reason why the employer should be allowed potentially to pay less pro rata to its pension fund creditors than other creditors and then continue blithely on with its business. And it is obvious that if Congress would allow an insolvent employer which had sold assets and was liquidating under the bankruptcy provisions of Chapter 7 to obtain the protections of Section 1405(a), then such protections should certainly also be available to Geltman, an employer which also had sold assets and was liquidating. The only difference is here immaterial — Geltman did not act under the insolvency protections of Chapter 7 of the Bankruptcy Act.

This distinction between bankruptcy reorganization and bankruptcy liquidations emphatically undercuts the conclusion that insolvency situations under ERISA are governed exclusively by Section 1405(b). The Ninth Cir-

cuit had to ignore this distinction to hold otherwise. Similarly, nothing in the statute mandates such an interpretation. If Congress had wanted to restrict Section 1405(a) from applying to insolvency liquidations it could easily have done so by stating that it did not apply to employers undergoing reorganization *or* insolvency liquidation. It did not do so.

This interpretation is further bolstered by the fact that both subsections (a) and (b) expressly refer to the liquidation or dissolution value of an employer in calculating withdrawal liability. This Court noted that Section 1405(a) applies to limit "withdrawal liability for employer who liquidates his business." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. ____, 89 L.Ed.2d 166, 179 n.8, 106 S.Ct. 1018 (1986). The Ninth Circuit also recognized that subsection (a) could apply to the liquidation or dissolution of an employer.

The ordinary meanings of the terms dissolution and liquidation contemplate and include insolvency situations. *See Webster's Third New International Dictionary* at 657 and 1319 (1966); *Black's Law Dictionary* (4th Ed.) at 560 (*de facto* dissolution of a corporation is defined as "That which takes place when corporation, by reason of insolvency or for other reason, suspends all operations and goes into liquidation. *Hidden v. Edwards,* 313 Mo. 642, 285 S.W. 462, 468.") Thus, both subsections may apply where there is employer insolvency that results in liquidation or dissolution. Section 1405(a) will apply where the employer meets the requirement of a bona fide sale of all or substantially all assets. In that case, Section 1405(a) will control if its application results in a lesser withdrawal liability than would result under application of Section 1405(b).

Legislative Intent Mandates Application of Section 1405(a) In This Case.

The Ninth Circuit attempted to construe Section 1405 in a vacuum and ignored legislative intent. The clear legislative intent of Section 1405(a) is to limit the impact of withdrawal liability on smaller businesses. Under Section 1405(a) in all situations where there is a sale of assets but no reorganization under Title 11, Congress has seen fit to provide dissolving businesses a limitation of liability based on a progressive percentage of the business' liquidation or dissolution value. 29 U.S.C. § 1405(a)(2). This percentage rate increases in the same manner as income tax rates applicable to successively higher brackets, beginning with a 30% rate applicable to dissolution values of $2,000,000 or less and increasing to 80% of the amount of any dissolution value in excess of $10,000,000.

It should be noted that the beginning 30% liability limitation is essentially the same as the 30% of net worth limitation of liability on single employer plan terminations contained in ERISA Section 4062(b)(2) [29 U.S.C. § 1362(b)(2)]. It seems more than coincidence that the relief allowed to all single employers in plan terminations should also be extended to employers who have participated in multiemployer plans (and meet the Section 1405(a) sale of assets test).

As a policy matter, the progressive rate system also strikes a reasonable balance between the solvency of the multiemployer fund involved and the burden on the dissolving employer. Larger, wealthier employers are required to bear an increasingly heavier burden of liability to the funds they are withdrawing from. This is because a larger, wealthier employer's withdrawal and resulting lost contributions would be far more likely to be injurious to the Fund's financial health. Accordingly, such an em-

ployer's withdrawal will generate progressively greater amounts of withdrawal liability payments to the Fund than in the case of a smaller, poorer employer's withdrawal, the loss of whose continuing contributions would be less likely to materially affect the Fund's ongoing health.

The balance thus struck represents the fruition of legislative intention expressed as follows:

> "5. Limitations on withdrawal liability.
> a. Overview.
> As noted above, employer withdrawal liability is necessary to insure that employers that remain in the plan are not burdened with funding liabilities that should have been funded by the withdrawn employer. *However, the Committees recognize that under some circumstances it is appropriate to balance the needs of these employers against those of the withdrawn employer.*" (Emphasis added.)

S. Rep. to accompany S. 1076, 96th Cong., 2nd Sess. 20195 (1980). *See also, Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund,* 578 F.Supp. 1222, 1230 (D.D.C. 1984) *aff'd,* 753 F.2d 166 (D.C. Cir. 1985).

Indeed, this Court in its recent Opinion pointed out Section 1405(a) as one of "a significant number of provisions in the Act [MPPAA] that moderate and mitigate the economic impact of an individual employer's [withdrawal] liability." *Connolly v. Pension Benefit Guaranty Corp., supra,* 475 U.S. at ____, 89 L.Ed.2d at 170 and n.8.

The Ninth Circuit's construction of Section 1405(a) destroys its intended moderating effect. Thus, the insolvent, liquidating employer is deprived of the limiting provisions of Section 1405(a) and is hit with the full, unintended, economic impact of withdrawal liability.

Full and Meaningful Application of Section 1405(a) Mandates Its Application In This Case.

The whole intent of Section 1405(a) would be rendered meaningless if it were viewed as mutually exclusive from rather than cumulative with (except in bankruptcy reorganization situations), the limitation set forth in subsection (b) of Section 1405. This is because the effect of subsection (b) is to limit withdrawal liability only by the amount of an employer's liquidation or dissolution value. That is no effective limitation at all and would serve to take every cent left in dissolving business. This is clearly contrary to the more reasonable and balanced limitation formula set forth in Section 1405(a).

Such reliance on Section 1405(b) ignores the balance Congress sought to be struck between the interests of the Fund and small withdrawing employers. The only balance which would be struck in the application of Section 1405(b) to the exclusion of Section 1405(a) would be between the Fund and other creditors of the withdrawing employer. By limiting the Fund's "take" to the employer's dissolution value, the other creditors' interests are protected from diminishment through some resulting pro rata reduction. Although a comforting result for other creditors, this leaves the small employer without the protections Congress sought to provide it in Section 1405(a).

One searches in vain for legislative history or any other policy expression of the need to protect or balance interests of the Fund with an employer's creditors. Indeed, this is because there is no such interest. Yet the restrictive interpretation of Section 1405 would trample upon the interests of the small withdrawing employer and protect the interests of its creditors, a result which undermines underlying Congressional policy and has no support whatsoever in the statute or elsewhere.

Proper interpretation of Section 1405 mandates application of the subsection (a) limitation to Petitioner's withdrawal liability.

CONCLUSION

The novel and surprising construction that the Ninth Circuit Court of Appeals has placed on Section 1405 should not be permitted to stand as precedent.

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

DATED: June 3, 1986.

Respectfully submitted,

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APPENDIX A.

OPINION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Plaintiff-Appellee,
v.
GELTMAN INDUSTRIES, INC.,
Defendant-Appellant.

Filed: March 7, 1986

Appeal from the United States District Court
for the Central District of California
The Honorable Robert M. Takasugi, District Judge, Presiding
Argued and Submitted February 6, 1986
Pasadena, California

Nos. 85-5720
85-5907
D.C. Nos. CV 84-2044-RMT
CV 85-269-RMT

Before: ANDERSON, PREGERSON, and WIGGINS, Circuit Judges.

ANDERSON, Circuit Judge:

Geltman Industries, Inc., (Geltman) appeals from the district court's order confirming an arbitration award in favor of the Trustees of the Amalgamated Insurance Fund (Fund) and denying Geltman's motion to modify the award. The arbitration involved the determination of Geltman's withdrawal liability and any limitations that may apply under Employment Retirement Income Security Act (ERISA), as amended by the Multiemployer

Pension Plan Amendment Act of 1980 (MPPAA). Geltman contends that the provisions of 29 U.S.C. § 1405(a) should have been applied in determining its limitation on withdrawal liability rather than the provisions of 29 U.S.C. § 1405(b).

The Fund cross-appeals from the district court's order denying the Fund's attorney's fees upon confirmation of the arbitration award in its favor. We affirm in part, reverse in part, and remand.

I

FACTS

The facts are undisputed in this case. Geltman was involved in the garment industry. Its business had been in decline for many years. In February, 1982, Geltman ceased its operations because "continued losses had brought it precariously close to a negative net worth." Geltman negotiated a sale of its assets and applied the proceeds to the payment of creditors and shareholders in the liquidation of the business. After the sale and payment of liabilities, Geltman was left with $98,000 in cash and a note providing for payment to Geltman of $2,000 per month for 120 months, given in exchange for Geltman's lease rights. This money and the payments due under the note were distributed to Geltman's shareholders.

After Geltman's dissolution, the Fund notified Geltman that Geltman owed $416,508.12 in withdrawal liability. The parties arbitrated the issue of withdrawal liability pursuant to 29 U.S.C. § 1401. The arbitrator awarded the entire liquidation value of Geltman ($98,000 in cash plus the note) to the pension plan pursuant to 29 U.S.C. § 1405(b) and stated that 29 U.S.C. § 1405(a) was not applicable to this case. The district court affirmed the

award. Geltman appeals, asking that the district court's order be reversed and the arbitration award be modified in accordance with the provisions of 29 U.S.C. § 1405(a). The Fund cross-appeals, claiming that the award of attorney fees is mandatory in this case, and that the district court erred in denying attorney fees on discretionary grounds.

II

DISCUSSION

A. Standard of Review-Arbitrator's Conclusions

The clear authorization of 29 U.S.C. § 1401(b)(2) for judicial review "to enforce, vacate, or modify the arbitrator's award" gives this court a right to review an arbitrator's legal rulings. *Republic Industries v. Teamsters Joint Council,* 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied,* 104 S.Ct. 3553 (1984). While the factual findings of an arbitrator are presumed correct, 29 U.S.C. § 1401 (c), the court may review *de novo* all conclusions of law. *Bd. of Trustees v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 2116 (1985). Statutory interpretation is a question of law subject to *de novo* review. *United States v. Horowitz,* 756 F.2d 1400, 1403 (9th Cir.), *cert denied,* 106 S.CT. 74 (1985).

We are asked to review an arbitrator's ruling on the interpretation and application of pertinent sections of 29 U.S.C. § 1405. Therefore, the proper standard of review is *de novo.*

B. STATUTORY INTERPRETATION — 29 U.S.C. § 1405(a) OR 29 U.S.C. § 1405(b)

In this case of first impression for an appellate court, we find ourselves faced with three different interpretations of the provisions of 29 U.S.C. § 1405.

Geltman contends that the arbitrator misinterpreted the scope of § 1405(a) by restrictively interpreting that section to apply only when there is a sale of assets, but no insolvency. Geltman further argues that the arbitrator was erroneous in finding that this was an insolvency liquidation, and, therefore, that § 1405(b) applied. Geltman finds fault with the arbitrator's preclusive interpretation of § 1405(a) because (1) it contradicts the clear language of the statute; (2) it is inconsistent with legislative intent and the underlying policy of ERISA and MPPAA; and (3) it renders § 1405(a)'s limitation virtually meaningless when read in conjunction with § 1405(b).

A slightly different interpretation is advanced in an amicus brief submitted by the Pension Benefit Guaranty Corporation (PBGC). The PBGC argues that § 1405(b) is inapplicable unless an employer is determined to be insolvent under § 1405(d)(1) and that insolvency cannot be determined unless the reduction in withdrawal liability provided for in § 1405(a) is first applied. PBGC argues, in the alternative, that even if the prerequisites of § 1405(b) are met (i.e., Geltman is insolvent under § 1405(d)(1)), § 1405(b) does not preclude the application of § 1405(a). The PBGC's interpretation gives the withdrawing employer the ability to choose that section which produces the lowest withdrawal liability.

The Fund argues that the plain language of § 1405 mandates the application of § 1405(b) and precludes the application of § 1405(a) in insolvency liquidations. There-

fore, according to the Fund, there is no choice for insolvent employers between the application of § 1405(a) and § 1405(b). The Fund contends that the application of § 1405(b) to insolvency liquidation is consistent with legislative history and the context and purpose of the statute. The Fund further contends that § 1405(d)(1) refers and applies to § 1405(b) and because § 1405(b) and § 1405(a) are mutually exclusive, there is no need to determine the insolvency of the employer by first applying § 1405(a).

We find the Fund's interpretation to be most consistent with the structure and plain language of the statute. Therefore, the proper analysis to be used in applying the various sections of 29 U.S.C. § 1405 involves the following two-step process. First, it must be decided whether the employer is an insolvent employer. This is done by looking to the provisions of § 1405(d)(1) without regard to § 1405(a). Second, if the employer is insolvent, then it is necessary to go to the provisions of § 1405(b) to determine any limitations on the employer's withdrawal liability. If, and only if, the employer is not insolvent, do the limitations in § 1405(a) apply. Under this analysis, we find that Geltman was insolvent and, as a consequence, § 1405(b) applies. Therefore, the district court was correct in its confirmation of the arbitration award in favor of the Fund.

We find support for our analysis in the plain language and the structure of the statute, as well as the underlying policies of ERISA and MPPAA. The plain language of 29 U.S.C. § 1405,[1] indicates that both § 1405(a) and

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[1] § 1405. Limitation on withdrawal liability

(a)(1) In the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of section 1384(d) of this

§ 1405(b) could apply to the liquidation or dissolution of an employer. Section 1405(a)(2) refers to "the liquidation or dissolution value of the employer" after a sale or exchange to determine the unfunded vested benefits allocable to that employer. To qualify for the limitation provisions of § 1405(a), there need only be a bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party. Ini-

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title), the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section), other than an employer undergoing reorganization under Title 11 or similar provisions of State law, shall not exceed the greater of —

(A) a portion (determined under paragraph (2)) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets), or

(B) the unfunded benefits attributable to employees of the employer.

(2) For purposes of paragraph (1), the portion shall be determined in accordance with the following table:

* * * *

(b) In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of —

(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer detemined —

(A) as of the commencement of liquidation or dissolution, and

(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

tially, it would appear that Geltman qualifies for § 1405(a) limitations. However, it is clear that § 1405(b) also applies to liquidations and dissolutions. This is apparent from the opening sentence which states, "[i]n the case of an insolvent employer undergoing *liquidation* or *dissolution* . . ." (Emphasis added). But, this section is more specific. It states that "[i]n the case of an *insolvent employer* . . .," any limitations on withdrawal liability will be determined differently from those determined in § 1405(a). Fundamental maxims of statutory construction require that a specific statutory section qualifies a more general section and will govern, even though the general provisions, standing alone, would encompass the same subject. *Monte Vista Lodge v. Guardian Life Ins. Co. of America,* 384 F.2d 126, 129 (9th Cir. 1967), *cert. denied,* 390 U.S. 950 (1968). *See also Markair, Inc. v. C.A.B.,* 744 F.2d 1383, 1385 (9th Cir. 1984) (specific terms of statute override general terms). The fact that both §§ 1405(a) and 1405(b) began with "in the case of" is further evidence that the sections are to operate exclusive of each other and cover separate and distinct situations. Furthermore, while § 1405(b) specifically mentions insolvency liquidations, § 1405(a) makes no such reference. Therefore, if an employer is insolvent, the provisions of § 1405(b) apply. If the employer is not insolvent, and the other conditions of § 1405(a) are met, the provisions of that section apply.

There is implicit support for this analysis in *Granada Wines v. New England Teamsters & Trucking,* 748 F.2d 42 (1st Cir. 1984). In that case it was held that "§ 4225(b) [§ 1405(b)] governs only liquidations, and § 4225(a) [§ 1405(a)] governs sales of assets . . ." *Id.* at 45. Also, in *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund,* 578 F.Supp. 1222 (D.D.C. 1984), *aff'd,* 753 F.2d 166 (D.C. Cir. 1985), it was held that "[C]ongress further saw fit to balance the burdens to be assumed by the plans and the

withdrawing employers, where an employer withdrawal was caused by insolvency (29 U.S.C. § 1405(b)); *or* by a sale of assets (29 U.S.C. § 1405(a)); . . . " *Id.* at 1230. (Emphasis added.)

Deciding that insolvent employers must proceed under the provisions of § 1405(b) does not end the analysis. Now it must be decided whether or not Geltman was an insolvent employer. We find that under the plain language of § 1405(d)(1), Geltman is an insolvent employer. This section states that "an employer is insolvent if the liabilities of the employer, *including withdrawal liability* under the plan (determined without regard to subsection (b) of this section [§ 1405(b)]), exceed the assets of the employer (determined as of the commencing of the liquidation or dissolution), . . . " (Emphasis added).[2] According to the undisputed facts, Geltman's assets, after paying off all its liabilities, not including the withdrawal liability, included $98,000 in cash and a note worth $140,000 after 10 years of payments at $2,000 per month. These assets were exceeded by Geltman's withdrawal liability of $416,508.12. Thus, Geltman was insolvent under the plain language of § 1405(d)(1).

C. Attorney Fees

The district court denied the Fund's motion for an award of attorney fees on what appear to be discretionary grounds. The Fund contends that this was error because attorney fees are mandatory in this case under 29 U.S.C. § 1132(g)(2) and 29 U.S.C. § 1401(d). Furthermore, the Fund argues that even if the award of attorney fees is

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[2]The record does not reveal what Geltman's assets and liabilities were at the "commencement of the liquidation" of its business as contemplated by § 1405(d)(1). However, we can infer from the facts in the record that Geltman's liabilities, including withdrawal liability, exceeded Geltman's assets even at that point.

discretionary, the district court abused its discretion in denying the award.

Geltman argues that the award of attorney fees is discretionary in this case under 29 U.S.C. § 1451(a) and the district court properly exercised its discretion in denying them. Geltman also claims that the Fund cannot raise the issue of mandatory attorney fees on appeal because it was not raised in the district court. Furthermore, Geltman contends that even if the issue of mandatory attorney fees is properly reviewable, the Fund is not entitled to them because Geltman was not delinquent in its withdrawal liability payments, and the Fund was not a prevailing party.

1. *Issue Raised for the First Time*

Geltman argues that because the Fund brought its motion for attorney fees under 29 U.S.C. § 1451(e), it cannot now argue for the first time on appeal that 29 U.S.C. § 1132(g) mandates they be awarded. It is true that the Fund referred to 29 U.S.C. § 1451(e), which allows for a discretionary award of attorney fees, in its reply to Geltman's Opposition to the Motion to Confirm Calculation of Attorney Fees and Costs. But, the Fund also referred to and quoted from 29 U.S.C. § 1401(d) in its Memorandum of Points and Authorities in reply to Geltman's Opposition to the Application to Confirm the Arbitrator's Award. As we discuss below, § 1401(d) requires mandatory attorney fees. Therefore, the issue of mandatory attorney fees was sufficiently raised in the district court.

2. *Mandatory Attorney Fees*

Under ERISA, the award of attorney fees to a pension plan is mandatory in all actions to collect delinquent contributions. 29 U.S.C. § 1132(g)(2); *Lads Trucking v.*

Board of Trustees, 777 F.2d 1371, 1373 (9th Cir. 1985); *Operating Eng. Pen. Trust v. Beck Eng. & Surveying,* 746 F.2d 557, 569 (9th Cir. 1984): *Operating Engineers Pension Trust v. Reed,* 726 F.2d 513, 514 (9th Cir. 1984); *Kemmis v. McGoldrick,* 706 F.2d 993, 997-98 (9th Cir. 1983); *San Pedro Fishermen's Welfare v. Di Bernardo,* 664 F.2d 1344, 1346 (9th Cir. 1982).[3] This mandatory attorney fees provision applies in all actions to collect delinquent contributions owed under 29 U.S.C. § 1145, including actions to collect unpaid employer withdrawal liabilities. *Lads Trucking,* 777 F.2d at 1374.

Geltman contends that because the Fund brought an action under §§ 1401(b)(2) and 1451 to *confirm* the arbitrator's award, this is not an action to collect delinquent contributions under §§ 1132 and 1145 and, therefore, the mandatory attorney fees provision does not apply.

However, 29 U.S.C. § 1401(d) treats an employer's failure to make timely payments in accordance with the arbitrator's final decision as a delinquent contribution.[4] 29 U.S.C. § 1401(d). As this court said in *Lads Trucking,* "[f]ees are mandatory in a collection action where there

---

[3]Section 1132(g)(2) provides that:

> "[i]n any action under this subchapter . . . to enforce section 1145 of this title [§ 1145 pertains to delinquent contributions] in which a judgment in favor of the plan is awarded, the court shall award the plan —
>
> • • •
>
> "(D) reasonable attorney's fees and costs of the action, to be paid by the defendant . . ."

[4]"In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title)." 29 U.S.C. § 1451(b).

has been '*any* failure of the employer to make *any* withdrawal liability payments within the time prescribed.' " *Lads Trucking,* 777 F.2d at 1374 (quoting 29 U.S.C. § 1451(b)) (emphasis added).

Geltman further argues that it was not delinquent in its contributions because it was not required to make any payments pending a final decision by the arbitrator. However, "[w]e have enforced the requirement of payment during arbitration." *Lads Trucking,* 777 F.2d at 1375; *Bd. of Trustees v. Thompson Bldg. Materials, Inc.,* 749 F.2d 1396 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 2116 (1985). *See also Textile Workers Pension v. Standard Dye & Finishing,* 725 F.2d 843 (2d Cir.), *cert. denied,* 104 S.Ct. 3554 (1984); *Trustees of Retirement Fund v. Lazar-Wisotzky, Inc.,* 550 F.Supp. 35, 38 (S.D.N.Y. 1982), *aff'd,* 738 F.2d 419 (2d Cir. 1984). Under ERISA, an employer must make payments within 60 days of the pension plan's demand, regardless of the pendency of arbitration. 29 U.S.C. § 1399(c)(2); *Lads Trucking,* 777 F.2d at 1374. " '[A]ny failure of the employer to make any withdrawal liability payment within the time prescribed' shall be a delinquency, 29 U.S.C. § 1451(b), with mandatory attorneys' fees to be awarded to the pension plan, 29 U.S.C. § 1132(g)(2)." *Lads Trucking,* 777 F.2d at 1375.

Geltman also points out that the arbitrator's initial decision contemplated payment to the Fund within 30 days of the date of the decision. The Fund's application for confirmation of the arbitrator's award was filed only 29 days after the award was issued. Therefore, argues Geltman, no delinquency existed at that time. However, *Lads Trucking* indicates that a delinquency is not determined in relation to the timing of arbitration. Rather, an employer is delinquent 60 days from the pension plan's demand. Geltman had made no payments within that 60-day period. Therefore, it was delinquent.

Finally, Geltman argues that the Fund was not a prevailing party and may not be awarded attorney fees. We disagree. Sections 1132, 1145, and 1401(d) all contemplate that mandatory attorney fees shall be awarded to the pension plan if there is any failure of the employer to make any withdrawal liability payment. It has been admitted by all parties that regardless of the outcome of the case, Geltman owed some withdrawal liability. Therefore, Geltman's failure to make any withdrawal liability payment within the time prescribed requires us to award the pension plan mandatory attorney fees.

For the reasons stated above, we AFFIRM the district court's order confirming the arbitration award in favor of the Fund, REVERSE the district court's order denying the Fund attorneys' fees, and REMAND.

APPENDIX B.

29 U.S.C. § 1405. LIMITATION ON WITHDRAWAL LIABILITY

(a) Unfunded vested benefits allocable to employer in bona fide sale of assets of employer in arm's-length transaction to unrelated party; maximum amount; determinative factors

(1) In the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party (within the meaning of section 1384(d) of this title), the unfunded vested benefits allocable to an employer (after the application of all sections of this part having a lower number designation than this section), other than an employer undergoing reorganization under Title 11 or similar provisions of State law, shall not exceed the greater of —

(A) a portion (determined under paragraph (2)) of the liquidation or dissolution value of the employer (determined after the sale or exchange of such assets), or

(B) the unfunded vested benefits attributable to employees of the employer.

(2) For purposes of paragraph (1), the portion shall be determined in accordance with the following table:

If the liquidation or dissolution value of the employer after the sale or exchange is —	The portion is —
Not more than $2,000,000 ...	30 percent of the amount.
More than $2,000,000, but not more than $4,000,000.	$600,000, plus 35 percent of the amount in excess of $2,000,000.
More than $4,000,000, but not more than $6,000,000.	$1,300,000, plus 40 percent of the amount in excess of $4,000,000.
More than $6,000,000, but not more than $7,000,000.	$2,100,000, plus 45 percent of the amount in excess of $6,000,000.
More than $7,000,000, but not more than $8,000,000.	$2,550,000, plus 50 percent of the amount in excess of $7,000,000.
More than $8,000,000, but not more than $9,000,000.	$3,050,000, plus 60 percent of the amount in excess of $8,000,000.
More than $9,000,000, but not more than $10,000,000.	$3,650,000, plus 70 percent of the amount in excess of $9,000,000.
More than $10,000,000	$4,350,000, plus 80 percent of the amount in excess of $10,000,000.

(b) Unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution; maximum amount; determinative factors

In the case of an insolvent employer undergoing liquidation or dissolution, the unfunded vested benefits allocable to that employer shall not exceed an amount equal to the sum of —

(1) 50 percent of the unfunded vested benefits allocable to the employer (determined without regard to this section), and

(2) that portion of 50 percent of the unfunded vested benefits allocable to the employer (as determined under paragraph (1)) which does not exceed the liquidation or dissolution value of the employer determined —

(A) as of the commencement of liquidation or dissolution, and

(B) after reducing the liquidation or dissolution value of the employer by the amount determined under paragraph (1).

(c) Property not subject to enforcement of liability; precondition

To the extent that the withdrawal liability of an employer is attributable to his obligation to contribute to or under a plan as an individual (whether as a sole proprietor or as a member of a partnership), property which may be exempt from the estate under section 522 of Title 11 or under similar provisions of law, shall not be subject to enforcement of such liability.

(d) Insolvency of employer; liquidation or dissolution value of employer

For purposes of this section —

(1) an employer is insolvent if the liabilities of the employer, including withdrawal liability under the plan (determined without regard to subsection (b) of this section), exceed the assets of the employer (determined as of the commencement of the liquidation or dissolution), and

(2) the liquidation or dissolution value of the employer shall be determined without regard to such withdrawal liability.

(e) One or more withdrawals of employer attributable to same sale, liquidation, or dissolution

In the case of one or more withdrawals of an employer attributable to the same sale, liquidation, or dissolution, under regulations prescribed by the corporation —

(1) all such withdrawals shall be treated as a single withdrawal for the purpose of applying this section, and

(2) the withdrawal liability of the employer to each plan shall be an amount which bears the same ratio to the present value of the withdrawal liability payments to all plans (after the application of the preceding provisions of this section) as the withdrawal liability of the employer to such plan (determined without regard to this section) bears to the withdrawal liability of the employer to all such plans (determined without regard to this section).

(Pub.L. 93-406, Title IV, § 4225, as added Pub.L. 96-364, Title I, § 104(2), Sept. 26, 1980, 94 Stat. 1243.)

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 3, 1986, I served the within Petition for Writ of Certiorari in re: "Geltman Industries, Inc. -v- The Trustees of the Amalgamated Insurance Fund" in the United States Supreme Court, October Term 1985, Nos. 85-5720 and 85-5907;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Ellen Greenstone, Esq.
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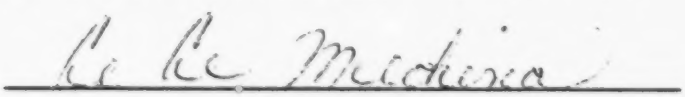
All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 3, 1986 at Los Angeles, California.



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85-2004

Supreme Court, U.S.
FILED
JUN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-5720 & 85-5907

In the Supreme Court

OF THE

United States

October Term, 1985

GELTMAN INDUSTRIES, INC.,
Petitioner,

VS.

THE TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION OF GELTMAN INDUSTRIES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE TRUSTEES OF THE AMALGAMATED INSURANCE FUND,

Petitioners,

VS.

GELTMAN INDUSTRIES, INC.,

Respondent.

THE TRUSTEES OF THE AMALGAMATED INSURANCE FUND,

Petitioners,

VS.

GELTMAN INDUSTRIES, INC.,

Respondent.

No. CV 84-2044-RMT Consolidated with
No. CV 85-269-RMT

ORDER CONFIRMING ARBITRATION AWARD

Entered: February 21, 1985 Filed: February 20, 1985

This matter has come before the court on the application by petitioners in Case No. CV 85-269 for confirmation of arbitration award and motion by respondent in Case No. CV 84-2044 to modify the supplemental arbitration decision. This court has considered the pleadings and other documents filed herein and has found that regardless of the standard of judicial review applied herein, this court agrees with the arbitrator's application of 29 U.S.C. § 1405(b) herein. Accordingly,

IT IS ORDERED that the application by petitioners in Case No. CV 85-269 for confirmation of arbitration award is granted, and the motion by respondent in Case No. CV 84-2044 to modify the supplemental arbitration decision is respectfully denied.

Dated: February 20, 1985.

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On June 12, 1986, I served the within Supplemental Appendix to Petition for Writ of Certiorari in re: "Geltman Industries, Inc. vs. The Trustees of the Amalgamated Insurance Fund" in the United States Supreme Court, October Term 1985, Nos. 85-5720 and 85-5907;

on the parties in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Ellen Greenstone, Esq.
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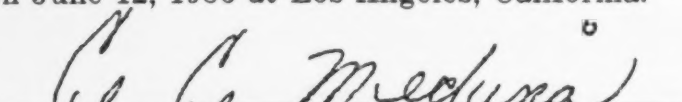
All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on June 12, 1986 at Los Angeles, California.



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Supreme Court, U.S.
FILED
JUL 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-2004

In the Supreme Court
OF THE
United States

OCTOBER TERM 1985

GELTMAN INDUSTRIES, INC.,
Petitioner,
VS.
THE TRUSTEES OF THE AMALGAMATED
INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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17PP

QUESTION PRESENTED

Was the limitation on employer withdrawal liability set forth in 29 U.S.C. § 1405(b) [Section 4225(b) of the Employee Retirement Income Security Act of 1974, PL 93-406 ("ERISA")] properly applied to the liability for withdrawal from the Fund incurred by Geltman Industries, Inc., when Geltman became insolvent and underwent liquidation and dissolution?

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No. 85-2004

In the Supreme Court

OF THE

United States

OCTOBER TERM 1985

GELTMAN INDUSTRIES, INC.,
Petitioner,

VS.

THE TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents The Trustees of the Amalgamated Insurance Fund ("Fund") respectfully submit that the Petition for Writ of Certiorari of Geltman Industries, Inc. does not raise an important question of federal law which should be settled by this Court and pray that review on writ of certiorari be denied.

REASONS FOR DENYING THE WRIT

I

Review On Writ Of Certiorari Is Not Warranted.

This case does not present special and important reasons for review. Even though Geltman raises an issue without guiding precedent as to the application of Section

1405's two limiting subsections, the Court of Appeals for the Ninth Circuit utilized approved canons of statutory construction in applying Section 1405(b) to limit Geltman's withdrawal liability. The Ninth Circuit's interpretation of Section 1405 will not have a significant impact on employers withdrawing from multiemployer pension plans. Rather, Section 1405 contains several calculation methods, dependent upon the pension plan's operations as well as the employer's actions and status, with varying and individualized impact on employers. Geltman merely seeks the calculation it regards most favorable to itself. Certiorari is not properly granted under such circumstances. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

II

The Plain Language Of Section 1405 Mandates Application Of Subsection (b) In This Case, As The Ninth Circuit Court Of Appeals Correctly Determined.

Section 1405(a) defines a limitation of withdrawal liability to be applied "[i]n the case of bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party . . ." Section 1405(b) separately prescribes a withdrawal liability limitation "[i]n the case of an insolvent employer undergoing liquidation or dissolution . . ." Section 1405(d) defines an "insolvent" employer as one whose liabilities, including withdrawal liability [determined without regard to subsection (b)], exceed its assets as of the commencement of the liquidation or dissolution [without including withdrawal liability].

In Geltman's case, the Court of Appeals for the Ninth Circuit, applying accepted principles of statutory construction and in agreement with both an arbitrator and the District Court, found that Geltman was an insolvent

employer, by statute and by its own admission, whose liquidation invoked the withdrawal liability formula of Section 1405(b).

The primary rule of statutory construction is to ascertain and give effect to the plain meaning of the language used. *American Tobacco Company v. Patterson,* 456 U.S. 63, 68 (1982). The words of a statute must be construed in context and provisions must be harmonized, internally and with each other, to the extent possible. Interpretive constructions which would render some words surplusage, meaningless, or inconsistent or which would render part of a statute inoperative are to be avoided. *Colautti v. Franklin,* 439 U.S. 379, 392, (1979); *United States v. Menasche,* 348 U.S. 528, 538-39 (1955). A specific statutory section qualifies a more general section and will govern, even where the general provision is broad enough to encompass the same subject. *Fourco Glass Company v. Transmirra Products Corporation,* 353 U.S. 222, 228-29 (1957).

The contention upon which Geltman bases its Petition for Certiorari, that the Section 1405(a) sale of assets language is broadly "available" to limit its withdrawal liability, would render subsection (b), with its express application to insolvent employers undergoing liquidation or dissolution, meaningless. Sale of any remaining assets is typically the manner in which insolvent businesses liquidate. If Geltman does not fall within the terms of Section 1405(b), then virtually no insolvent employer will. Even if, as Geltman asserts, a subsection (a) sale of assets could encompass an insolvency liquidation, Congress did not write the statute that way but specifically included subsection (b) to apply to an insolvent employer undergoing liquidation. *Russello v. United States,* 464 U.S. 16, 23 (1983); *United States v. Naftalin,* 441 U.S. 768, 773-74 (1979). As the Ninth Circuit Court of Appeals cor-

rectly concluded, subsections (a) and (b) parallel each other grammatically, and subsection (b), as the more specific, controls.

III

Application Of Section 1405(b) Is Consistent With The Legislative History, Context, And Purpose Of ERISA.

One of the principal purposes of ERISA, when enacted in 1974, was to ensure that employees and their beneficiaries not be deprived of retirement benefits by the termination of pension plans before sufficient funds accumulated to fulfill promised benefits. Although the 1974 Act imposed some contingent liability for unfunded benefits on employers withdrawing from multiemployer pension plans, ERISA did not adequately protect plans from the adverse consequences of termination or withdrawal of employers from multiemployer plans and potentially encouraged withdrawal. To alleviate the problem, the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") was enacted. MPPAA placed greater responsibility for continued maintenance of the financial integrity of a multiemployer plan on withdrawing employers. See generally *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

In provisions pertinent to the context of this case, MPPAA provides that an employer shall not be considered to have withdrawn from a plan solely because of a change in corporate structure, including change in corporate identity, merger, consolidation, and division, if the change causes no interruption in contributions or obligation to contribute to the plan. 29 U.S.C. § 1398. The same section provides that a suspension of contributions during a labor dispute does not constitute withdrawal. A bona fide arm's-length sale of assets to an unrelated party such that the seller ceases covered operations or ceases to

have an obligation to contribute to the plan does not result in a withdrawal if the buyer is obligated to contribute to the plan for substantially the same number of contribution base units as did the seller. 29 U.S.C. § 1384. Under certain circumstances, though, the seller remains secondarily liable for the buyer's withdrawal liability. Employers whose total withdrawal liability would not otherwise exceed $50,000 are excused altogether. 29 U.S.C. § 1389. Withdrawal liability may also be limited to the extent of transfer of liability to another plan. See 29 U.S.C. §§ 1391 and 1415.

Although as the Ninth Circuit Court of Appeals concluded, the Court need look no further than the plain statutory language to resolve this case, the context of Section 1405 supports the result below. MPPAA's provisions ensure that, where the employing entity undergoes a structural change, some entity remains responsible either to continue contributions or to provide a corresponding amount to fund future claims on the plan by participants and beneficiaries.

A. Section 1405(b) applies to all insolvency liquidations and dissolutions.

Congress expressed its intention that Section 1405(b) apply to all insolvency liquidations and dissolutions, rather than serve narrowly to distinguish between two types of Title 11 bankruptcies (reorganization and liquidation) as Geltman argues:

> "b. Insolvency: Under the bill, an insolvent employer undergoing a liquidation or dissolution is *always* liable for an amount equal to 50 percent of his normal withdrawal liability. However, the employer's exposure for the next 50 percent of his normal withdrawal liability is limited to the employer's liquidation or dissolution value . . . . To qualify for this rule,

> an insolvent employer need not undergo a formal liquidation or dissolution. It must, however, be insolvent and wind up its business affairs . . . ."
> Senate Floor Explanation, Cong. Record, p. S10117, July 29, 1980; emphasis added.

The Senate language plainly contemplates that when an insolvent employer winds up its business, whether formally or informally, under Chapter 7 or 11, or on its own as Geltman has done, the employer will always be liable for at least 50 percent of its normal withdrawal liability under Section 1405(b).

Contrary to Geltman's argument, by expressly excluding Title 11 reorganizations from Section 1405(a) coverage of asset sales, Congress did not thereby extend inferential coverage under Section 1405(a) to Chapter 7 liquidations. Instead, "it appears that Congress equated reorganizations with asset sales, rather than liquidations, and decided that that type of asset sale needed no withdrawal liability limitation." *Granada Wines, Inc.*, 748 F.2d 42, 45 (1st Cir. 1984). In context in the MPPAA, Section 1405 does not distinguish between types of bankruptcies. Section 1405 excludes employers undergoing Chapter 11 reorganization from reducing their withdrawal liability altogether and distinguishes between otherwise solvent employers who sell their assets without a successor assuming their contribution obligation [subsection (a)] and insolvent employers who liquidate or dissolve [subsection (b)], for purposes of applying the withdrawal liability limitation formulae.[1]

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[1]Section 1405(a) expressly refers to ERISA Section 4204 [29 U.S.C. § 1384], which governs an asset sale to a purchaser who assumes obligations to the plan. Section 1405(a) thus contemplates a similar sale of an ongoing business, rather than the distribution or liquidation of assets of a failing and insolvent business, the purchaser(s) of assets of which would naturally be incapable of assum-

B. Section 1405 does not give insolvent employers a choice of subsection (a).

Nothing in Section 1405 gives a withdrawing employer a choice in the amount of withdrawal liability it will pay.[2]

Although implicitly acknowledging the applicability of Section 1405(b), Geltman argues that Section 1405(a) is nonetheless available to it and that the Ninth Circuit's conclusion otherwise will have a profound impact on withdrawing employers. However, even under Section 1405(a) an employer is not automatically guaranteed the favorable sliding scale limitation based on a percentage of liquidation value Geltman seeks here. Section 1405(a) limits withdrawal liability to "the greater of" the portion of the liquidation or dissolution value of the employer determined by the sliding scale [§ 1405(a)(1)(A)] or the unfunded vested benefits attributable to employees of the employer [§ 1405(a)(1)(B)]. If a plan has calculated the actual unfunded vested benefits attributable to the employer's employees and that amount is greater than the applicable percentage of liquidation value, the sliding scale limitation is statutorily made unavailable.

Moreover, in practice, application of one or the other of Section 1405's two subsections does not consistently produce the greatest reduction of an employer's liability. The lower withdrawal liability as between the subsections (a) and (b) depends on the elements of the calculations, e.g.,

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ing the task of continuing contributions. Section 1405(a)(2) refers to a "sale *or exchange*" of assets (emphasis added), further supporting an interpretation of Section 1405(a) as intended to apply to an ongoing or solvent business.

[2]In fact, MPPAA places a burden on the withdrawing employer to establish both the applicability and extent of any claimed limitation under Section 1405; in the absence of a clear showing, a plan may assume that the limitations do not apply. House Floor Explanation (Cong. Record) p. H7899, August 26, 1980.

amounts owed other creditors, the plan's calculation of unfunded vested benefits attributable to the employees, etc., not on the character of the transaction, sale or insolvency, which necessitates the calculations.[3]

Thus, the ultimate withdrawal liability limitation calculated under Section 1405 is highly specific to the withdrawing employer and to its relationship with the multiemployer plan. Allowing the withdrawing employer to recharacterize the corporate changes which cause withdrawal liability in order to produce the lowest total liability would interject uncertainty into the entire scheme of calculations, would ultimately weaken multiemployer funds, and would subvert the purposes of MPPAA to hold withdrawing employers responsible.

C. The reduction in Section 1405(b) protects the employer's creditors, not the employer.

MPPAA legislatively intends to limit the impact of withdrawal on multiemployer plans. While MPPAA contains provisions like Section 1405 reducing withdrawal liability in certain circumstances, these provisions are

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[3]One commentator has recognized that Section 1405(b) may produce a higher liability in the case of an insolvent employer than if the employer fell under subsection (a), as happened to be the case with Geltman.

> "... While [subsection 1405(b)] limits a plan's claim vis-a-vis other creditors of an insolvent, *it may actually augment what the plan could claim if the employer were solvent.* This would be the case if the liability limitations of section [1405(a)], *e.g.*, 30 percent of liquidation value, resulted in a greater reduction than the 50 percent provided by section [1405(b)]."
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> Schmidt, "MPPAA Withdrawal Liability: Calculation, Methodology, Statutory Limitations, and Exceptions, and Accounting Treatment," in ERISA The Multiemployer Pension Plan Amendments Act of 1980 at 48, Practising Law Institute (1984); emphasis added.

limited exceptions to MPPAA's broader remedial purpose. MPPAA does not evince a specific intent to limit the impact of withdrawal liability on smaller businesses, as Geltman urges.

For example, although Section 1405(a) may result in a proportionate break for smaller businesses in some cases, as is discussed above, its sliding scale calculation does not apply to every 1405(a) sale of assets.[4] If the plan has calculated a greater amount of unfunded benefits attributable to the employees, the plan's calculation will prevail regardless of the size of the employer's business.

Section 1405 comes into play where the employer liquidates or sells the business and no purchaser assumes contribution obligations. In enacting subsection (a), Congress apparently decided that too great an impediment to the sale of solvent businesses would be created by imposition of full withdrawal liability. However, alleviating an impediment to the sale of ongoing businesses is not a factor in insolvency liquidations. Where the employer is insolvent, there is only so much to go around to creditors, including the plan. Congress must have known that withdrawal liability would be substantial and wrote Section 1405(b) so that a single creditor, the plan, would not predominate in insolvency.[5]

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[4]Geltman urges an analogy be drawn between Section 1405(a)'s sliding scale and ERISA Section 4062 [29 U.S.C. § 1362], which contains a set scale (30% of net worth) in certain cases applicable to single employer plan terminations. There is no suggestion in the legislative history that Congress intended such a selective analogy. Moreover, the comparison to single employer provisions ignores the substantial purpose of MPPAA of protecting other employers remaining in a multiemployer plan from the impact on them of withdrawal.

[5]The insolvency limitation also functions preventively to alleviate concern about the impact of potential withdrawal liability on an

Section 1405(b) establishes a minimum — 50% of normal withdrawal liability — for which the employer is liable, without respect to its size, to protect the plan and in recognition that insolvent employers have other creditors knocking on the door. If, however, the insolvent employer's other creditors have been paid, as was the case with Geltman, Section 1405(b) protects the plan up to the full liquidation or dissolution value. At that point, the plan cannot and should not be expected to reduce its withdrawal liability even further from the limitations of Section 1405(b) (and unlike any other creditors) to enable the insolvent employer or its shareholders to carry a return away from the liquidation at the expense of its employees' pensions and of employers remaining in the plan. If the insolvent employer's other creditors have been paid and if the amount of withdrawal liability owed to the plan, after the limitations of Section 1405(b) are applied, is equal to or greater than the employer's liquidation or dissolution value, then Section 1405(b) gives the plan the entire amount up to the liquidation value to cover employees' pension benefits, as was awarded by the arbitrator and upheld by the District Court and Court of Appeals in this case. The employer has already received its accommodation in the form of a statutory limitation of its liability.

CONCLUSION

Respondents submit that the Ninth Circuit Court of Appeals correctly construed Section 1405, based on the plain meaning of the statutory language. The Court

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employer's ability to secure credit. Berger, "Exceptions and Limitations Applicable to the Imposition of Withdrawal Liability under the Multiemployer Pension Plan Amendments Act of 1980," in Multiemployer Pension Plan Amendments Act of 1980: Opportunities and Hazards at 203, Harcourt Brace (1980). However, even this commentator states that the entire liability under Section 1405(b) comes "ahead of those with an equity interest in the insolvent employer." *Id.*

reached a result consistent with the legislative history and purpose of ERISA. Respondents respectfully pray that review on writ of certiorari be denied.

Dated: July 1, 1986.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 1, 1986, I served the within Respondents' Brief in opposition in re: "Celtman Industries Inc. -v- The Trustees of the Amalgamated Insurance Fund" in the United States Supreme Court, October Term 1985, No. 85-2004;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 1, 1986, at Los Angeles, California

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